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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA

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8 JOAQUIN BROUSHON HILL,

Case No. 3:16-cv-00694-MMD-WGC

9 Petitioner,

ORDER

10 v.

11 TIMOTHY FILSON, *et al.*,

12 Respondents.

13 This *pro se* habeas matter under 28 U.S.C. § 2254 comes before the court on  
14 respondents' motion to dismiss petitioner Joaquin Broushon Hill's petition (ECF No. 8).  
15 Hill filed a response; he styled it as a motion to respond to dismissal, which the court  
16 construes as his opposition (ECF No. 17), and respondents replied (ECF No. 16).

17 **I. PROCEDURAL HISTORY AND BACKGROUND**

18 On November 30, 2006, a jury found Hill guilty of first-degree murder with use of a  
19 deadly weapon (Exh. 59).<sup>1</sup> Hill was sentenced to two consecutive terms of life in prison  
20 without the possibility of parole. (Exh. 66.) Judgment of conviction was filed on January  
21 11, 2007. (Exh. 67.) The Nevada Supreme Court affirmed his conviction in a published  
22 opinion on July 24, 2008, and remittitur issued on August 19, 2008. (Exhs. 84, 86.)

23 Hill filed a state postconviction habeas petition on December 1, 2008. (Exh. 93.)  
24 The state district court appointed counsel and ultimately denied the petition. (Exh. 162.)  
25 The Nevada Supreme Court affirmed the denial of the petition on June 22, 2016, and  
26 remittitur issued on July 20, 2016. (Exhs. 187, 189.)

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28 <sup>1</sup>Exhibits referenced in this order are exhibits to respondents' motion to dismiss,  
ECF No. 8, and are found at ECF Nos. 9-15.

Hill dispatched his federal petition for mailing on or about November 22, 2016. (ECF No. 6.) Respondents now move to dismiss the petition on the bases that the claims are unexhausted, procedurally barred and/or noncognizable in federal habeas corpus. (ECF No. 8.)

## II. LEGAL STANDARDS & ANALYSIS

### A. Exhaustion

State prisoners seeking federal habeas relief must comply with the exhaustion rule codified in § 2254(b)(1):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) The applicant has exhausted the remedies available in the court so the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The purpose of the exhaustion rule is to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal court, and to “protect the state courts’ role in the enforcement of federal law.” *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

A habeas petitioner must “present the state courts with the same claim he urges upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim, not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting claims under the United States

1 Constitution” and given the opportunity to correct alleged violations of the prisoner’s  
2 federal rights. *Duncan*, 513 U.S. at 365; see *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th  
3 Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear  
4 instruction to potential litigants: before you bring any claims to federal court, be sure that  
5 you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.  
6 2001) (quoting *Rose*, 455 U.S. at 520). “[G]eneral appeals to broad constitutional  
7 principles, such as due process, equal protection, and the right to a fair trial, are  
8 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106 (citations omitted).  
9 However, citation to state caselaw that applies federal constitutional principles will suffice.  
10 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

11 A claim is not exhausted unless the petitioner has presented to the state court the  
12 same operative facts and legal theory upon which his federal habeas claim is based.  
13 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The  
14 exhaustion requirement is not met when the petitioner presents to the federal court facts  
15 or evidence which place the claim in a significantly different posture than it was in the  
16 state courts, or where different facts are presented at the federal level to support the same  
17 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
18 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458  
19 (D. Nev. 1984).

20 **1. Grounds 3, 4, 5(b), and 5(c)**

21 Hill asserts the following in grounds 3 through 5:

22 Ground 3: Hill’s due process and fair trial rights were violated when trial  
23 court and public defender refused to qualify Hill’s alibi witness (ECF No. 6 at 7);

24 Ground 4: several instances of prosecutorial misconduct that violated Hill’s  
25 due process and fair trial rights (*id.* at 9-10);

26 Ground 5(b): trial counsel was ineffective for failing to adequately  
27 investigate Hill’s competency to stand trial and other significant mental  
28 impairments; and

1 Ground 5(c): trial counsel was ineffective for failing to object to the  
2 admission into evidence of the autopsy photographs (*id.* at 11).

3 Respondents are correct that Hill did not present any of these claims to the Nevada  
4 Supreme Court. (See Exhs. 80, 177.) They are, therefore, unexhausted.

5 **B. Procedural Default**

6 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
7 Act (AEDPA), provides that this court may grant habeas relief if the relevant state court  
8 decision was either: (1) contrary to clearly established federal law, as determined by the  
9 Supreme Court; or (2) involved an unreasonable application of clearly established federal  
10 law as determined by the Supreme Court.

11 “Procedural default” refers to the situation where a petitioner in fact presented a  
12 claim to the state courts but the state courts disposed of the claim on procedural grounds,  
13 instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal  
14 court will not review a claim for habeas corpus relief if the decision of the state court  
15 regarding that claim rested on a state law ground that is independent of the federal  
16 question and adequate to support the judgment. *Id.* The *Coleman* Court explained the  
17 effect of a procedural default:

18 In all cases in which a state prisoner has defaulted his federal claims in  
19 state court pursuant to an independent and adequate state procedural rule,  
20 federal habeas review of the claims is barred unless the prisoner can  
21 demonstrate cause for the default and actual prejudice as a result of the  
alleged violation of federal law, or demonstrate that failure to consider the  
claims will result in a fundamental miscarriage of justice.

22 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The  
23 procedural default doctrine ensures that the state’s interest in correcting its own mistakes  
24 is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046  
25 (9th Cir. 2003).

26 To demonstrate cause for a procedural default, the petitioner must be able to  
27 “show that some objective factor external to the defense impeded” his efforts to comply  
28 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to

1 exist, the external impediment must have prevented the petitioner from raising the claim.  
2 See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

3 To demonstrate a fundamental miscarriage of justice, a petitioner must show the  
4 constitutional error complained of probably resulted in the conviction of an actually  
5 innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9<sup>th</sup> Cir. 1998). “[A]ctual  
6 innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United*  
7 *States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for  
8 extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare allegations  
9 unsupplemented by evidence do not tend to establish actual innocence sufficient to  
10 overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9<sup>th</sup> Cir. 1992).

### 11 **1. Ground 2**

12 Respondents argue that ground 2 is procedurally barred (ECF No. 8 at 5). Hill  
13 asserts in ground 2 that his Fifth, Sixth and Fourteenth Amendment rights were violated  
14 because the court failed to adequately inquire into Hill’s competency to stand trial, and  
15 the State prevented the trial court from instructing the jury on a temporary insanity defense  
16 (ECF No. 6 at 5).

17 In his state postconviction habeas petition, Hill raised this claim for the first time.  
18 (See Exh. 177.) The Nevada Court of Appeals affirmed the denial of this claim as  
19 procedurally barred because it could have been raised in his direct appeal. (Exh. 187);  
20 NRS § 34.810(1)(b)(2). Petitioner bears the burden of proving good cause for his failure  
21 to present the claim and actual prejudice. NRS § 34.810(3). The Ninth Circuit Court of  
22 Appeals has held that, at least in non-capital cases, application of the procedural bar at  
23 issue in this case — NRS § 34.810 — is an independent and adequate state ground.  
24 *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9<sup>th</sup> Cir. 2003); see also *Bargas v. Burns*, 179  
25 F.3d 1207, 1210-12 (9<sup>th</sup> Cir. 1999). Therefore, the Nevada Court of Appeal’s  
26 determination that federal ground 2 was procedurally barred under NRS § 34.810(1)(b)  
27 was an independent and adequate ground to affirm the denial of the claim in the state

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petition. Hill does not argue that he can demonstrate cause and prejudice to excuse the default. Accordingly, ground 2 is dismissed as procedurally barred.

### **C. Claims Cognizable in Federal Habeas Corpus**

A state prisoner is entitled to federal habeas relief only if he is being held in custody in violation of the constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). Unless an issue of federal constitutional or statutory law is implicated by the facts presented, the claim is not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). A petitioner may not transform a state-law issue into a federal one merely by asserting a violation of due process. *Langford v. Day*, 110 F.3d 1380, 1381 (9th Cir. 1996). Alleged errors in the interpretation or application of state law do not warrant habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004).

#### **1. Ground 1**

Hill contends that his Sixth and Fourteenth Amendment due process rights were violated because there were defects in the grand jury proceedings, including that jurors knew the victim or victim's family. (ECF No. 6 at 3.) However, as respondents point out, the right to a grand jury has not been applied to the states via the Fourteenth Amendment. *See Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000); *Hurtado v. California*, 110 U.S. 516, 538 (1884). Thus, a challenge to grand jury proceedings does not raise a claim of federal constitutional law. Accordingly, ground 1 is dismissed as noncognizable on federal habeas review. 28 U.S.C. § 2254(d).

### **D. Conclusory Claims**

In federal habeas proceedings, mere conclusions of violations of federal rights without specifics do not state a basis for federal habeas relief. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). A petition may be summarily dismissed if the allegations in it are "vague, conclusory, palpably incredible, patently frivolous or false." *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (internal citations omitted); *see also Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

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1                   **1.       Ground 6**

2           Hill cites to *Apprendi v. New Jersey*, 530 U.S. 466 and also states that his Fifth,  
3 Sixth and Fourteenth Amendment rights to a new trial under *Cunningham v. California*,  
4 549 U.S. 270 (2007) case were violated. (ECF No. 6 at 13.) Hill sets forth no factual  
5 allegations whatsoever in ground 6. Further, these two cases involve the federal  
6 constitutional requirement that any fact that increases the penalty for a crime beyond the  
7 prescribed statutory maximum (other than a prior conviction) must be submitted to a jury  
8 and proved beyond a reasonable doubt. However, Hill was sentenced by a jury, not a  
9 judge. (Exh. 64.) Ground 6 is, therefore, dismissed as conclusory and clearly lacking in  
10 merit.

11           **III.       PETITIONER'S OPTIONS REGARDING UNEXHAUSTED CLAIM**

12           A federal court may not entertain a habeas petition unless the petitioner has  
13 exhausted available and adequate state court remedies with respect to all claims in the  
14 petition. *Rose*, 455 U.S. at 510. A "mixed" petition containing both exhausted and  
15 unexhausted claims is subject to dismissal. *Id.* In the instant case, the court concludes  
16 that ground 1 is dismissed as noncognizable in federal habeas; ground 2 is dismissed as  
17 procedurally barred; ground 6 is dismissed as conclusory and plainly meritless; and  
18 grounds 3, 4, 5(b), and 5(c) are unexhausted. Because the court finds that the petition  
19 contains unexhausted claims, petitioner has these options:

20                   1.       He may submit a sworn declaration voluntarily abandoning  
21 the unexhausted claims in his federal habeas petition, and proceed only  
on the exhausted claims;

22                   2.       He may return to state court to exhaust his unexhausted  
23 claims, in which case his federal habeas petition will be denied without  
prejudice; or

24                   3.       He may file a motion asking this court to stay and abey his  
25 exhausted federal habeas claims while he returns to state court to exhaust  
his unexhausted claims.

26 With respect to the third option, a district court has discretion to stay a petition that it  
27 may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The  
28 *Rhines* Court stated:

1 [S]tay and abeyance should be available only in limited circumstances.  
2 Because granting a stay effectively excuses a petitioner's failure to present  
3 his claims first to the state courts, stay and abeyance is only appropriate  
4 when the district court determines there was good cause for the petitioner's  
5 failure to exhaust his claims first in state court. Moreover, even if a petitioner  
6 had good cause for that failure, the district court would abuse its discretion  
if it were to grant him a stay when his unexhausted claims are plainly  
meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas  
corpus may be denied on the merits, notwithstanding the failure of the  
applicant to exhaust the remedies available in the courts of the State").

7 *Rhines*, 544 U.S. at 277.

8 If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance  
9 in which he demonstrates good cause for his failure to exhaust his unexhausted claims  
10 in state court, and presents argument regarding the question of whether or not his  
11 unexhausted claims are plainly meritless. Respondents would then be granted an  
12 opportunity to respond, and petitioner to reply. Or petitioner may file a declaration  
13 voluntarily abandoning his unexhausted claims, as described above.

14 Petitioner's failure to choose any of the three options listed above, or seek other  
15 appropriate relief from this court, will result in his federal habeas petition being dismissed.  
16 Petitioner is advised to familiarize himself with the limitations periods for filing federal  
17 habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations periods may have  
18 a direct and substantial effect on whatever choice he makes regarding his petition.

19 Finally, Hill filed what he styled as a motion to the courts in which he states that  
20 Ely State Prison officials destroyed some of his legal mail (ECF No. 20). First, a claim of  
21 destruction of legal mail would implicate Hill's civil rights under 42 U.S.C. § 1983.<sup>2</sup>  
22 Second, respondents have provided ESP officials' responses to Hill's grievances, in  
23 which officials state that they do not have any of Hill's legal mail and that he is in  
24 possession of all of his legal mail. (ECF No. 22.) The court takes seriously allegations of  
25 prison officials' interference with inmates' legal mail. However, currently, the motion to  
26 dismiss stands fully briefed, and Hill has not set forth specific, credible allegations that he

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27 <sup>2</sup>Hill may elect to file a separate action to pursue this claim, but this Order does not  
28 address or suggest the merits of such a claim.



1 was prevented from setting forth a specific argument or filing a specific document.  
2 Accordingly, the motion is denied.

#### 3 **IV. CONCLUSION**

4 It is therefore ordered that respondents' motion to dismiss (ECF No. 8) is granted  
5 in part as follows: (1) grounds, 1, 2, and 6, are dismissed as set forth in this order; and  
6 (2) grounds 3, 4, 5(b) and 5(c) are unexhausted.

7 It is further ordered that petitioner will have thirty (30) days to either: (1) inform this  
8 Court in a sworn declaration that he wishes to formally and forever abandon the  
9 unexhausted grounds for relief in his federal habeas petition and proceed on the  
10 exhausted grounds; or (2) inform this Court in a sworn declaration that he wishes to  
11 dismiss this petition without prejudice in order to return to state court to exhaust his  
12 unexhausted claims; or (3) file a motion for a stay and abeyance, asking this Court to hold  
13 his exhausted claims in abeyance while he returns to state court to exhaust his  
14 unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or  
15 seek other appropriate relief, respondents may respond to such motion as provided in  
16 Local Rule 7-2.

17 It is further ordered that if petitioner elects to abandon his unexhausted grounds,  
18 respondents will have thirty (30) days from the date petitioner serves his declaration of  
19 abandonment in which to file an answer to petitioner's remaining grounds for relief. The  
20 answer must contain all substantive and procedural arguments as to all surviving grounds  
21 of the petition, and must comply with Rule 5 of the Rules Governing Proceedings in the  
22 United States District Courts under 28 U.S.C. §2254.

23 It is further ordered that petitioner will have thirty (30) days following service of  
24 respondents' answer in which to file a reply.

25 It is further ordered that if petitioner fails to respond to this order within the time  
26 permitted, this case may be dismissed.

27 It is further that petitioner's motion to respond to dismissal (ECF No. 17) is granted  
28 since petitioner need not ask for leave to respond to the motion to dismiss.

1 It is further ordered that petitioner's motion to courts (ECF No. 20) is denied.

2 DATED THIS 1<sup>st</sup> day of February 2018.

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5 MIRANDA M. DU  
6 UNITED STATES DISTRICT JUDGE  
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